IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

AMERICAN ASSOCIATION OF POLITICAL CONSULTANTS, INC., *et al.*, Plaintiffs, v. LORETTA LYNCH, in her official capacity as Attorney General of the United States, and THE FEDERAL COMMUNICATIONS COMMISSION, Defendants.	Case No. 5:16-CV-252 (JCD)

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Plaintiffs' memorandum in opposition to Defendants' motion to dismiss ("Opp'n") repeatedly emphasizes that their sole constitutional challenge is to 47 U.S.C. § 227(b)(1)(A)(iii), which requires prior express consent for calls to cell phones made using a prerecorded voice or autodialer. What their response fails adequately to grapple with, however, is their own stated basis for that constitutional challenge. As is made abundantly clear in their Complaint and Opposition, Plaintiffs believe § 227(b)(1)(A)(iii) is unconstitutional because FCC orders and a recent legislative amendment exempting calls made to collect debts owed to or guaranteed by the government are allegedly content based.

Plaintiffs cannot request the extraordinary relief they seek without facing the consequences of the means they use to achieve that result. First, if Plaintiffs were correct that the FCC orders were impermissibly content based, the proper remedy would be to invalidate the orders themselves. But the Hobbs Act prohibits this Court from striking down the allegedly offending FCC orders. Plaintiffs have conceded as much. *See* Opp'n 10 n.2. And even if the Hobbs Act were not in force, striking down the FCC orders would afford Plaintiffs no relief. Plaintiffs have conceded that, too. *See id.* at 12. To avoid the implications of these undisputed points, Plaintiffs advance the proposition that the statutory provision itself must be struck down where an agency has issued an (allegedly) unconstitutional regulation or order pursuant to that statute, even though the statute is unquestionably constitutional in the absence of the agency's actions. But that contention finds no support in the law.

Second, with respect to the single statutory exemption that Plaintiffs cite, even if Plaintiffs were correct that the 2015 amendment exempting calls to collect debts owed to or guaranteed by the federal government is unconstitutional, again, the proper remedy would be to sever that amendment from the remainder of the TCPA, which has been upheld consistently over the two decades since its enactment. But again, striking down the government-debt exemption would afford the Plaintiffs no relief.

Plaintiffs cannot challenge the constitutionality of a federal statute without pointing to a specific reason *why* the statute is unconstitutional and explaining how the available remedies would bring them relief. Here, Plaintiffs' explanation makes clear that, contrary to their protestations, they by and large do not challenge the constitutionality of the TCPA, and where they do, the proper remedy for their alleged violation would do them no good. The First Amended Complaint should therefore be dismissed.

I. PLAINTIFFS LACK STANDING.

A. Even if FCC Orders Cited by Plaintiffs Were Unconstitutional, the Proper Remedy Would Not Be to Invalidate the TCPA as a Whole.

Plaintiffs go to great lengths to disavow the notion that they are asking this Court to strike down the FCC orders that Plaintiffs believe to be content based, apparently agreeing that this Court lacks jurisdiction to do so. Opp'n 10 n.2. But in so doing, Plaintiffs make the far more sweeping argument that, because the exemptions from § 227(b)(1)(A)(iii) are allegedly content based, the statutory provision itself is rendered unconstitutional. *See, e.g.*, Opp'n 12 ("The FCC believes it has the power to make content-based exemptions to the cell phone call ban. . . . The fact that Congress and the FCC continue to create content-based exemptions to the cell phone call ban . . . leads to the conclusion that the cell phone call ban is unconstitutional); ECF No. 18, Pls.' First Amended Complaint ("FAC") ¶ 43 (contrasting the calls Plaintiffs would like to make with calls allegedly exempted from the reach of § 227(b)(1)(A)(iii) by an FCC order, and then concluding that, as a result, "the cell phone call ban violates the constitutional rights of these political organizations"). Plaintiffs cannot be right. In enacting exemptions, the agency does not amend the statute that Congress enacted. The constitutionality of the statute itself is unaltered and unaffected by the agency's actions. And the validity of those actions is not properly before this Court.

As set forth in Defendants' motion to dismiss, *see* Defs.' Mot. 4 n.2, most of the allegedly offending FCC orders are the product of a statutory grant of authority to the FCC to make exemptions that further protect privacy interests. *See* 47 U.S.C. § 227(b)(2)(C) (providing that the FCC "may, by rule or order, exempt from the requirements of paragraph (1)(A)(iii) of this subsection calls to a telephone number assigned to a cellular telephone service that are not charged to the called party, subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights this section is intended to protect").[1] But the mere fact that a statute permits an agency to issue regulatory exemptions does not render the statute unconstitutional. Section 227(b)(2)(C) does not, on its face, discriminate based on content or purport to authorize the FCC to do so. And even if the FCC issued a content-based exemption using this authority, the exemption would not automatically be invalid; it would instead be judged under the appropriate level of scrutiny. *See, e.g., Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1666 (2015) (upholding state ban on campaign donation solicitation by candidates for judicial office under strict scrutiny). Moreover, if the statutory provision authorizing the FCC to create exemptions (§ 227(b)(2)(C)) did, absurdly, allow something like "exemptions that violate the First Amendment," it would not render unconstitutional the prohibition on automated calls to which the

[1] At least one other is the result of the FCC interpreting an ambiguity as to *how* consent may be obtained in certain circumstances. *See Matter of Groupme, Inc./Skype Commc'ns S.A.R.L. Petition for Expedited Declaratory Ruling Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 29 F.C.C. Rcd. 3442, 3444–45 (2014).

recipient has not consented (§ 227(b)(1)(A)(iii)) — a completely separate provision. At most, the provision authorizing the unconstitutional agency action would itself be invalid.

Plaintiffs have cited *nothing* that would even tend to suggest that where an agency order is unconstitutional, the proper remedy is to strike down the statute pursuant to which the order issued, nor have they pointed to any case where that has ever happened.[2] To the contrary, where courts have struck down agency action, they have not suggested that the *statute* must go too. *See, e.g.*, *Boardley v. U.S. Dep't of Interior*, 615 F.3d 508, 525 (D.C. Cir. 2010) (holding regulations unconstitutional but suggesting agency could make no rules to remedy constitutional infirmity); *Initiative & Referendum Inst. v. U.S. Postal Serv.*, 417 F.3d 1299, 1318 (D.C. Cir. 2005) (Garland, J.) (holding Postal Service regulation unconstitutional as applied); *see also Educ. Media Co. at Va. Tech v. Insley*, 731 F.3d 291, 294 (4th Cir. 2013) (ruling Virginia regulation unconstitutional but leaving statute intact). To accept Plaintiffs' contrary suggestion would be to accept the proposition that, when an agency issues an order or regulation pursuant to a statute, the agency is in fact changing the statute itself. That is simply wrong. *See, e.g.*, *Dalton v. United States*, 816 F.2d 971, 974 (4th Cir. 1987) (Agency "lacks power even by a regulation adopted after strict compliance with the Administrative Procedure Act . . . to repeal, modify, or nullify a statute."). Plaintiffs' argument also flies in the face of the Supreme Court's instruction to "limit the solution to the

[2] Plaintiffs also argue that invalidating the exemptions created by the FCC would not "properly redress Plaintiffs' injury as the FCC . . . [is] empowered to create new exemptions." Opp'n 9. But courts are constrained to resolve only the controversies actually before them and may not reach out to enjoin hypothetical future actions or provisions. Plaintiffs' related suggestion that the Court should strike down the statute because *Congress* could, pursuant to the Act, create more exemptions down the line, *see* Opp'n 9, is not just illogical — even if the TCPA were wiped off the books, Congress could pass a new statute — but an even more egregious threat to separation of powers principles. In neither of the cases cited by Plaintiffs did the Court so much as hint that it was acting to curtail Congress's power to legislate in the future. *See* Opp'n 9–10 (citing *City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994); *Carey v. Brown*, 447 U.S. 455, 459–71 (1980)).

problem." *United States v. Under Seal*, 819 F.3d 715, 721 (4th Cir. 2016) (quoting *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328 (2006)). Indeed, courts are hesitant to strike down a statutory provision in full due to the unconstitutionality of one portion. Where the allegedly problematic provisions come from agency orders that are not even a part of the statute, the notion of striking the statute itself is absurd.

In any event, even if the Court were to accept the proposition that the existence of agency orders that are allegedly constitutionally suspect renders the TCPA invalid, such a decision would still hinge on a determination that the FCC orders themselves are, in fact, suspect. *See, e.g.*, FAC ¶¶ 29-35 (cataloguing the allegedly content-based exemptions, which include six FCC orders and the 2015 amendment by Congress); Opp'n 7 (Plaintiffs "challenge the cell phone call ban, only, *based on the litany of content-based exemptions to it created by Congress and the FCC* . . ." (emphasis added)). But Congress has expressly specified that such challenges must be brought in the court of appeals in the first instance. 47 U.S.C. § 402(a); 28 U.S.C. § 2342(1). Plaintiffs attempt to distinguish the Hobbs Act cases that Defendants' cited, but their distinctions once again rely on the incorrect premise that Plaintiffs' challenge implicates only the statute. Opp'n 12–16. As explained above, the basis for Plaintiffs' challenge to the statute is that the FCC orders exempting certain calls are allegedly content based. Thus, the validity of the FCC orders is at issue and the Hobbs Act applies. *See, e.g.*, *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1120, 1119 (11th Cir. 2014) ("The district court lacks jurisdiction to consider claims to the extent they depend on establishing that all or part of an FCC order subject to the Hobbs Act is wrong as a matter of law or is otherwise invalid.").

For these reasons, even if the FCC orders relied upon by Plaintiffs were unconstitutional (which they are not), they could not possibly serve as the basis for striking down the *statute* that allowed them to be created. Moreover, a decision holding the orders invalid would afford Plaintiffs no relief and consideration of such a challenge would be outside this Court's jurisdiction.

B. Even if Plaintiffs Were Right That the 2015 Amendment to the TCPA Is Impermissibly Content-Based, the Proper Remedy Would Be to Strike Only That Provision — a Remedy Which Would Offer Plaintiffs No Redress.

Other than the FCC orders, the only basis Plaintiffs identify in the First Amended Complaint for alleging that § 227(b)(1)(A)(iii) violates the First Amendment is the 2015 amendment to the statute, which exempts from the autodialing prohibition calls made to collect debts owed to or guaranteed by the Federal Government. As Defendants argued in their motion to dismiss, even if Plaintiffs were correct that this exemption is impermissibly content based, the exemption, which was enacted twenty-four years after the TCPA, could be severed from the remainder of the TCPA and invalidated independently. The remainder of the statute — the only part that applies to Plaintiffs — would be unaffected. Plaintiffs have not argued to the contrary — they make absolutely no attempt to refute Defendants' severability analysis — and instead argue only that "[n]o explicit guarantee of redress to a plaintiff is required to demonstrate a plaintiff's standing." Opp'n 17 (quoting *Equity In Athletics, Inc. v. Dep't of Educ.*, 639 F.3d 91, 100 (4th Cir. 2011)). Far from suggesting that Plaintiffs need an explicit guarantee of redress in order to demonstrate standing, Defendants' point is just the opposite: Plaintiffs have no ability to obtain redress for their injuries. Particularly in light of Plaintiffs' failure to address severability, it is exceedingly difficult to understand how a narrow exemption, enacted more than twenty years after the rest of the statute, could require the wholesale invalidation of § 227(b)(1)(A)(iii), despite the fact that courts have unanimously affirmed the constitutionality of that provision. *See, e.g.*, *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871 (9th Cir. 2014); *Moser v. FCC*, 46 F.3d 970 (9th Cir. 1995); *Wreyford v. Citizens for Transp. Mobility, Inc.*, 957 F. Supp. 2d 1378, 1380 (N.D. Ga. 2013);

Strickler v. Bijora, Inc., No. 11 CV 3468, 2012 WL 5386089, at *5–6 (N.D. Ill. Oct. 30, 2012); *Abbas v. Selling Source, LLC*, No. 09 CV 3413, 2009 WL 4884471, at *7–8 (N.D. Ill. Dec. 14, 2009); *Joffe v. Acacia Mortgage Corp.*, 121 P.3d 831 (Ariz. Ct. App. 2001), *cert. denied*, 549 U.S. 1111 (2007) (mem). Thus, because it is not "likely" that Plaintiffs' injury would be redressed by a favorable decision, *Doe v. Va. Dep't of State Police*, 713 F.3d 745, 753 (4th Cir. 2013), they lack standing.

CONCLUSION

For the foregoing reasons, the Court should dismiss Plaintiffs' First Amended Complaint for lack of jurisdiction.

Dated: October 7, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Motion was filed electronically through the Eastern District of North Carolina Electronic Filing System. Notice of this filing will be sent by operation of the court's Electronic Filing System to all registered users in this case. All counsel to have filed a notice of appearance are registered users.

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